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No. 01-1873

IN THE
SUPREME COURT OF THE UNITED STATES

OCTOBER TERM 2001

RICHARD VIETH, et al. *Appellants*

v.

ROBERT C. JUBELIRER AND MATTHEW J. RYAN, et al., *Appellees*

ON APPEAL FROM THE UNITED STATES DISTRICT COURT FOR THE MIDDLE DISTRICT OF PENNSYLVANIA

MOTION TO DISMISS OR AFFIRM

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QUESTIONS PRESENTED

1. Does this Court lack jurisdiction under 28 U.S.C. §1253 to review an interlocutory order of a three-judge court dismissing some but not all claims in a five-count complaint challenging a state law for congressional redistricting?

2. Should a three-judge court's dismissal of a claim for partisan gerrymandering for failure to allege facts sufficient to establish the "actual discriminatory effect" required by *Davis v. Bandemer*, 478 U.S. 109 (1986), be summarily affirmed, when it is consistent with the decision in *Bandemer* and with the decisions of other three-judge courts, many of which have been summarily affirmed by this Court?

3. Is a claim that a state law for congressional redistricting will elect a disproportionate number of representatives from one political party non-cognizable under U.S. CONST. art. I, §4?

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ON APPEAL FROM THE UNITED STATES DISTRICT COURT FOR THE MIDDLE DISTRICT OF PENNSYLVANIA

MOTION TO DISMISS OR AFFIRM

Pursuant to Supreme Court Rule 18.6, Robert C. Jubelirer, Lieutenant Governor and President *Pro Tempore* of the Senate of the Commonwealth of Pennsylvania and Matthew J. Ryan, Speaker of the House of Representatives of the Commonwealth of Pennsylvania ("Presiding Officers") (Appellees herein and Defendants below), move to dismiss the present appeal for lack of jurisdiction or, in the alternative, to affirm the order below because the questions presented by Appellants for review are so insubstantial as to require no further briefing or oral argument.

Pursuant to Supreme Court Rule 18.4, Presiding Officers have also filed a Jurisdictional Statement in support of their conditional cross-appeal from the order at issue herein. Should the Court determine that appellate jurisdiction is appropriate and require briefing and argument in the present appeal, Presiding Officers request that their cross-appeal from the same order be consolidated and that briefing and argument be allowed on the questions presented therein.

STATEMENT OF THE CASE

A. Facts Relevant to this Motion

As a result of reapportionment following the 2000 Census, the Commonwealth of Pennsylvania lost two seats in Congress, going from 21 to 19. On January 7, 2002, a new state law ("Act 1") established district boundaries for the Commonwealth's 19 congressional seats.[1]

When the Pennsylvania General Assembly recessed on December 13, 2001, different versions of the new redistricting plan (SB 1200) had been passed by the Pennsylvania Senate and the Pennsylvania House. SB 1200 was then considered by a Conference Committee, which reported a new version to the Senate and House. The final vote in the Senate on SB 1200 was 28-22; the final vote in the House was 132-59. Forty-two members of the House Democrat Caucus voted in favor of the bill, which would not have had a majority for passage without such bi-partisan support.

Based on unofficial November 2001 voter registration data, there are 3,733,739 registered Democrats; 3,233,171 registered Republicans; 3,266 registered Green

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[1] The previous congressional redistricting plan for the Commonwealth was drawn in 1992 by the Supreme Court of Pennsylvania.

party members and 803,365 other registered voters in Pennsylvania. *See* Am. Compl. ¶25; App. at 124a; *see also* Unofficial Voter Registration Data Nov. 2001, PA Dept. of State (http://www.dos.state.pa.us/bcel/arc/elec_arc.html). Using these data, Democrats account for 48%, Republicans account for 41.6% and others account for 10.3% of the registered voters. No party has a majority.

In the 2000 general election, 11 Republicans and 10 Democrats were elected to Congress. Am. Compl. ¶15; App. at 120a. In the five statewide elections held in 2000, Republicans won 3 races (U.S. Senator, Attorney General and State Treasurer) and Democrats won 2 races (President and Auditor General). Am. Compl. ¶27; App. at 125a.[2]

B. Procedural History and Decision Below

The February 22, 2002 opinion and order at issue in the present appeal were entered in response to motions to dismiss filed by Presiding Officers and Executive Officers pursuant to Fed. R. Civ. P. 12(b)(1) and (6). The three-

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[2] In Am. Compl. ¶27, other than for President, Plaintiffs allege the percent of the vote won by Republican and Democrat candidates based only on the totals for those two parties' candidates: U.S. Senator (53.5% R, 46.5% D); Attorney General (55.6%R, 44.4% D); Auditor General (41.3% R, 58.7% D); State Treasurer (51.1% R, 48.9% D). App. at 125a. These figures exclude votes for other candidates.

In 2001, the Republican candidates won all 7 statewide elections for Supreme, Superior and Commonwealth Court. The Republican candidate for Supreme Court received 52.7% of all votes cast; the three Republican candidates for Superior Court received 55% of all votes cast; and the three Republican candidates for Commonwealth Court received 57% of all votes cast. *See* Unofficial 2001 Municipal Election Results, PA. Dept. of State (Supreme, Superior & Commonwealth Courts) (http://web.dos.state.pa.us/elections/elec_results/dsf/elec_menu.cgi?eyear=2001&etype=M).

judge court did not dispose of all five claims in the Amended Complaint. While it dismissed Claim II (alleging partisan gerrymandering in violation of the Equal Protection Clause), the court declined to dismiss Claim I (alleging a violation of the principle of one-person, one-vote) for failure to state a claim.

To state a claim for partisan gerrymandering under the plurality decision in *Davis v. Bandemer*, 478 U.S. 109 (1986), a plaintiff must allege "both intentional discrimination against an identifiable political group and an actual discriminatory effect on that group." *Id.* at 127 (citing *Mobile v. Bolden*, 446 U.S. 55, 67-68 (1980)). In their Jurisdictional Statement, Appellants provide a misleadingly simplified discussion of the three-judge court's analysis of the issue of discriminatory effects and inaccurately suggest that the three-judge court decision in *Badham v. Eu*, 694 F. Supp. 664 (N.D. Cal. 1988), *aff'd*, 488 U.S. 1024 (1989), as opposed to this Court's decision in *Bandemer*, provided the basis for the lower court's reasoning and determination to dismiss Claim II.

Contrary to Appellants' suggestion, the court below began its analysis by noting that while *Bandemer* "offers little concrete guidance" as to the issue of discriminatory effects, the result in that case, understood in terms of the evidence presented, could be drawn upon for aid. The court also examined the decision in *Badham*, noting that it had been summarily affirmed by this Court. 188 F. Supp.2d at 454, n.12; App. at 23a. Then, drawing on both its understanding of *Bandemer* and the analysis set forth in *Badham*, the three-judge court summarized the allegations before it:

> In this case, Plaintiffs' allegations amount to this: Act 1 is rigged to guarantee that thirteen of Pennsylvania's nineteen congressional representatives will be Republicans. As a result, Democrats will have a more difficult time electing

> their candidates. Due to this impediment, 'the Democratic Party will have greater difficulty in fielding competitive candidates.' Thus, Act 1 operates 'to essentially shut Democrats and Democratic voters out of the political process.' Plaintiffs, in particular, 'will suffer harm ... [because they] will now be increasingly represented by members of Congress who do not represent their views.'

188 F. Supp.2d at 546; App. at 25a (internal citations omitted; brackets in the original). The court then proceeded to reject these allegations as insufficient to allege the required discriminatory effects under *Bandemer*.

First, the three-judge court characterized the allegations as amounting to nothing more than a plea for proportional representation which "*Bandemer* soundly rejected [as] a basis for an equal protection violation." *Id.*; App. at 25a. Second, since *Bandemer* had explicitly rejected the assumption that voters who vote for a losing candidate will not be adequately represented by the winning candidate, Plaintiffs' allegation that, as Democrats, they will be represented in Congress by Republicans who do not share their views, was irrelevant. *Id.*; App. at 26a. Third, focusing on the relevant group – i.e., Pennsylvania Democrat voters, *not* the Democrat party – the court explained: "Stripped to its bones, Plaintiffs' allegations, in this respect, amount to a claim that Act 1 will make it more difficult for them to elect Democratic candidates to Congress. However, this simply is not the end-all be-all constitutional analysis that Plaintiffs make it out to be." *Id.*; App. at 26a. For support, the court quoted the following passage from the *Bandemer* plurality opinion:

> '[T]he mere fact that a particular apportionment scheme makes it more difficult for a particular group in a particular district to elect representatives of its choice does not render the scheme

> constitutionally infirm. This conviction, in turn, stems from a perception that the power to influence the political process is not limited to winning elections. ... Thus, a group's electoral power is not unconstitutionally diminished by the simple fact of an apportionment scheme that makes winning elections more difficult, and a failure of proportional representation alone does not constitute impermissible discrimination under the Equal Protection Clause.'

188 F. Supp.2d at 546-47 (quoting *Bandemer*, 478 U.S. at 131-32); App. at 26a-27a. Finally, the court noted that Plaintiffs' allegations failed to support their conclusory argument that Act 1 "'essentially shuts Democratic voters out of the political process'" as "there are no allegations that anyone has ever prevented, or will prevent, Plaintiffs from: registering to vote; organizing with other like-minded voters; raising funds on behalf of candidates; voting; campaigning; or speaking out on matters of public concern." *Id.* at 547; App. at 27a.

Having found that Plaintiffs failed to meet the threshold discriminatory effects test of *Bandemer*, the three-judge court dismissed Claim II. As noted above, however, it did not dismiss Count I (alleged violation of the one-person, one-vote principle). A hearing was held on the remaining claim and the implementation of Act 1 was enjoined by the order entered April 8, 2002.[3] *See* App. at 45a.

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[3] The propriety of the April 8, 2002 decision is the subject of Appeal Nos. 01-1817 and No. 01-1823. Following the invalidation of Act 1, the Pennsylvania General Assembly passed a bill containing a revised congressional redistricting plan, which, on April 18, 2002, the Governor signed into law as Act No. 2002-34. Act 1 will still be used for this congressional election cycle, but will be superseded by Act 34 for the 2004

ARGUMENT

I. JURISDICTION

In their Jurisdictional Statement, Appellants invoke 28 U.S.C. §1253 as the basis for this Court's jurisdiction. J.S. at 1. That statutory provision, however, does not apply here and the appeal should be dismissed.

Section 1253 provides:

> Except as otherwise provided by law, any party may appeal to the Supreme Court from an order *granting or denying*, after notice and hearing, *an interlocutory or permanent injunction* in any civil action, suit or proceeding required by any Act of Congress to be heard and determined by a district court of three judges.

28 U.S.C. §1253 (emphasis added).[4] This statutory provision provides the sole basis for a direct appeal to this Court from a decision of a three-judge court in the context of reapportionment. As a rule, it is to be narrowly construed. *See MTM, Inc. v. Baxley*, 420 U.S. 799, 804 (1975) (noting the "historic congressional policy of minimizing the mandatory docket of th[e] Court in the interest of sound judicial administration").

Appellants characterize the dismissal of their partisan gerrymandering claim as the denial of an injunction in order to fit within the narrow confines of Section 1253. *See* J.S. at 1. They simultaneously downplay the significance of two facts about the February

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congressional elections. On April 23, 2002, the three-judge court stayed the injunction imposed by the April 8, 2002 order.

[4] The underlying action was required to be heard by a three-judge court pursuant to 28 U.S.C. §2284(a).

22, 2002 order that are relevant to the jurisdictional analysis: (1) the order did not purport to deny injunctive relief but only to rule on the motions to dismiss then before the court, and (2) the order, while dismissing the partisan gerrymandering claim, left Claim I (alleged violation of the one-person, one vote principle) pending. Thus, at the time the partisan gerrymandering claim was dismissed, injunctive relief against Act 1 was still available, and was, in fact, later granted when the act was invalidated and its implementation was enjoined.

The February 22, 2002 order, which did not explicitly or implicitly deny injunctive relief, can only be described as an "interlocutory" order over which this Court lacks jurisdiction under Section 1253.

In *Goldstein v. Cox*, 396 U.S. 471 (1970), this Court determined that it lacked jurisdiction to review a similar type of interlocutory order. There, the plaintiffs had filed a direct appeal pursuant to Section 1253 from an order entered by a three-judge court denying their motion for summary judgment on the basis that it constituted an order denying an injunction. The Court concluded the order was an interlocutory order and was not appealable because it did not grant or deny a preliminary injunction. *Id.* at 475.

Appellants here, similar to what the plaintiffs in *Goldstein* did, attempt to characterize an interlocutory order as the denial of injunctive relief appealable under section 1253. *See also Gonzalez v. Automatic Employees Credit Union*, 419 U.S. 90 (1974) (rejecting appellant's theory, under 28 U.S.C. §1253, that dismissal of his complaint for lack of standing was tantamount to denying him permanent injunctive relief). The order, however, did not deny Appellants' request for injunctive relief, which eventually was granted when, on April 8, 2002, the three-judge court enjoined the implementation of Act 1.

Appellants chose not to seek a preliminary injunction, which, whether granted or denied, would have been immediately appealable to this Court under section 1253. Having made that strategic choice, they cannot now assert that an interlocutory order dismissing some but not all their claims was a denial of injunctive relief. The present appeal should be dismissed.[5]

II. INSUBSTANTIAL QUESTIONS PRESENTED

Assuming this Court finds the exercise of appellate jurisdiction under Section 1253 to be appropriate, it should summarily affirm the decision of the three-judge court dismissing Claim II for failure to state a claim.[6]

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[5] At least one court of appeals has interpreted opinions of this Court to suggest that, once the Court assumes appellate jurisdiction of an order granting or denying injunctive relief, it will consider other rulings and orders of the three-judge court below. *See Hays v. State of Louisiana*, 18 F.3d 1319, 1321 n.9 (5th Cir. 1994) (citing *Mitchell v. Donovan*, 398 U.S. 427 (1970) (a direct appeal which includes "only a declaratory judgment " is unreviewable) and *Rockefeller v. Catholic Medical Center of Brooklyn & Queens, Inc.*, 397 U.S. 820 (1970) ("The judgment appealed from does not include an order granting or denying an interlocutory or permanent injunction and is therefore not appealable to this Court under 28 U.S.C. §1253.")). Appellants, here, however, did not file a conditional cross-appeal from the April 8, 2002 order enjoining implementation of Act 1 in conjunction with either Appeal No. 01-1817 or No. 01-1823, and thus the propriety of the February 22, 2002 order is not otherwise before this Court.

[6] As noted above, Presiding Officers have filed a conditional cross-appeal from the February 22, 2002 order in which they raise two issues with respect to the three-judge court's disposition of Claim II – whether the partisan gerrymandering claim is justiciable and whether Plaintiffs successfully alleged the existence of a "politically identifiable group" sufficient to meet the second prong of the *Bandemer* analysis. If this Court notes probable jurisdiction of thisappeal

A. "Discriminatory Effects"

In *Bandemer*, a plurality of the Court set forth the standard for assessing claims of unconstitutional partisan gerrymandering under the Fourteenth Amendment. To state a claim, a plaintiff must allege "both intentional discrimination against an identifiable political group and an actual discriminatory effect on that group." 478 U.S. at 127 (citing *Mobile,* 446 U.S. at 67-68). Unlawful discrimination occurs in this context "only when the electoral system is arranged in a manner that will consistently degrade a voter's or a group of voters' influence on the political system as a whole." 478 U.S. at 132. A "mere lack of proportional representation will not be sufficient to prove unconstitutional discrimination" because an equal protection violation occurs only where "a history of disproportionate results appear[s] in conjunction with strong indicia of lack of political power and the denial of fair representation." *Id.* at 132, 139. This "indicia" requirement was patterned on challenges brought by racial groups to individual multi-member districts, where the racial minorities had "essentially been shut out of the political process." *See id.* at 139.

Appellants' partisan gerrymandering claim faltered under a straightforward application of the strict *Bandemer* "discriminatory effects" test, not from some "construction of *Bandemer* that [] essentially overrule[d] it." *See* J.S. at 15. The fact that partisan gerrymandering claims typically rise or fall on the "discriminatory effects" prong of the analysis *is by design* and derives from the standard set forth by the *Bandemer* plurality itself, and not, as Appellants posit, from some extreme misinterpretation of that standard

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(rather than summarily affirming), Presiding Officers respectfully ask that this Court also consider the questions presented in their conditional cross-appeal.

crafted and followed by the lower courts. *Bandemer* recognized partisan gerrymandering claims as justiciable but purposefully established a difficult standard.

It is evident throughout the plurality decision in *Bandemer* that the requisites for a cause of action were intended to be stringent. Stressing that neither the Constitution nor prior precedent of the Court requires proportional representation of political parties in Congress, the *Bandemer* plurality explained (in language specifically quoted by the three-judge court below) that:

> the mere fact that a particular apportionment scheme makes it more difficult for a particular group in a particular district to elect the representative of its choice does not render that scheme constitutionally infirm. This conviction, in turn, stems from a perception that the power to influence the political process is not limited to winning elections. An individual or a group of individuals who votes for a losing candidate is usually deemed to be adequately represented by the winning candidate and to have as much opportunity to influence that candidate as other voters in the district ... . Thus, a group's electoral power is not unconstitutionally diminished by the simple fact of an apportionment scheme that makes winning elections more difficult, and a failure of proportional representation alone does not constitute impermissible discrimination under the Equal Protection Clause.

478 U.S. at 131-32 (citing *Mobile*, 446 U.S. at 111 & n.7). The *Bandemer* plurality was unwilling to presume that "those who are elected will disregard the disproportionately underrepresented group." *Id.* at 132. It explained that "unconstitutional discrimination occurs only when the electoral system is arranged in a manner that will

consistently degrade a voter's or a group of voters' influence on the political process as a whole." *Id.*

The *Bandemer* plurality both distinguished and analogized between vote dilution in an individual district and statewide, again summarizing the principles that would guide its analysis:

> [A]s in individual district cases, an equal protection violation may be found only where the electoral system substantially disadvantages certain voters in their opportunity to influence the political process effectively. In this context, such a finding of unconstitutionality must be supported by evidence of continued frustration of the will of a majority of the voters or effective denial to a minority of voters of a fair chance to influence the political process.

Id. at 133. The plurality was particularly leery of setting the threshold for a partisan gerrymandering claim too low.

> Inviting attack on minor departures from some supposed norm would too much embroil the judiciary in second-guessing what has consistently been referred to as a political task for the legislature, a task that should not be monitored too closely unless the express or tacit goal is to effect its removal from legislative halls. We decline to take a major step towards that end, which would be so much at odds with our history and experience.

Id. at 133-34.

The plurality recognized the difficulties inherent in the standard they had set: "Determining when an electoral system has been 'arranged in a manner that will consistently degrade a voter's or a group of voters' influence on the political process as a whole' *is of necessity a difficult inquiry*." *Id.* at 143 (internal citations omitted;

emphasis added). Thus, it is evident from the *Bandemer* plurality opinion itself that the requisite discriminatory effects were meant to be difficult to show.

Appellants propose a different standard than every court that has ever applied *Bandemer*. They suggest that unless "redistricting [] achieve[s] a 'level of parity between votes and representation sufficient to ensure ... that majorities are not consigned to minority status,'" illegitimate partisan gerrymandering has occurred. *See* J.S. at 13 (quoting *Bandemer*, 478 U.S. at 126 n.9); *see also* J.S. at 9, 13, 20, and 22 ("under *Bandemer*, a State violates the Equal Protection Clause when, as here, it consigns a political party to one-third or less of the congressional seats, even if that party consistently wins a majority of the vote statewide"). Appellants' "consigning" argument appears to spring from Justice O'Connor's criticism in *Bandemer* that, in finding partisan gerrymandering justiciable, the plurality made an illegitimate policy determination to favor proportional representation. *See* 478 U.S. at 126, n.9. However, it does not appear anywhere in the plurality's discussion of the elements of a partisan gerrymandering claim. Appellants are attempting to merge the plurality decision in *Bandemer* with Justice O'Connor's critical characterization of the plurality decision, so as to cobble together a purported majority view.

Appellants seek to transform a rationale for justiciability into a standard of proof in order to ease their burden. But as every three-judge court addressing the issue has recognized, the *Bandemer* plurality set a standard that would be most difficult to meet. The three-judge court below did not err in its choice of standard or in its application. Its analysis is consistent with that of numerous other three-judge courts that have dismissed partisan gerrymandering claims for lack of allegations sufficient to meet the discriminatory effects prong of the *Bandemer* standard. *See e.g., Badham v. Eu*, 694 F. Supp. 664 (N.D.

Cal. 1988), *aff'd*, 488 U.S. 1024 (1989) (motion to dismiss); *Pope v. Blue*, 809 F. Supp. 392 (W.D.N.C. 1992), *aff'd*, 506 U.S. 801 (1992) (motion to dismiss); *Holloway v. Hechler*, 817 F. Supp. 617 (S.D. W.Va. 1992), *aff'd*, 507 U.S. 956 (1993) (motion to dismiss); *Marylanders for Fair Representation v. Schaefer*, 849 F. Supp. 1022 (D. Md. 1994) (defendants' motion for summary judgment); *White v. Alabama*, 867 F. Supp. 1571 (M.D. Ala. 1994) (defendants' motion for summary judgment); *O'Lear v. Miller*, 2002 U.S Dist. LEXIS 9533 & 10010 (E.D. Mich. No. 01-72584, decisions issued May 24 & June 5, 2002) (motion to dismiss).

B. Racial Gerrymandering Decisions

In contesting the three-judge court's application of the discriminatory effects test of *Bandemer*, Appellants fault the court for ignoring recent decisions in the racial discrimination context which Appellants claim provide "direction on how to identify an unconstitutional gerrymander [.]" J.S. at 23. The court below, however, was absolutely correct in not relying on *Shaw v. Reno*, 509 U.S. 630 (1993), and *Miller v. Johnson*, 515 U.S. 900 (1995), to interpret *Bandemer*. The concepts applicable to partisan gerrymandering and racial gerrymandering are not interchangeable.

While the plurality in *Bandemer* did derive its standard for a *prima facie* showing of partisan gerrymandering from the Court's racial gerrymandering decisions, the partisan gerrymandering showing, as the plurality stressed, is different from that applied to other equal protection claims, including allegations of racial gerrymandering. *See Bandemer*, 478 U.S. at 134 n.14 ("The requirement of a threshold showing is derived from the peculiar characteristics of these political gerrymandering claims. We do not contemplate that a similar requirement would apply to our Equal Protection cases outside of this particular context.").

To establish a *prima facie* showing of racial gerrymandering in the redistricting context, a plaintiff must show that:

> race was the *predominant* factor motivating the legislature's decision to place a significant number of voters within or without a particular district. To make this showing, a plaintiff must prove that the legislature subordinated traditional race-neutral districting principles, including but not limited to compactness, contiguity, respect for political subdivisions or communities defined by actual shared interests, to racial considerations. Where these or other race-neutral considerations are the basis for redistricting legislation, and are not subordinated to race, a state can defeat a claim that a district has been gerrymandered on racial lines.

Miller, 515 U.S. at 916 (quoting *Shaw*, 509 U.S. at 647) (emphasis added). This is a very different showing than that required under *Bandemer*. *See* 478 U.S. at 127 (plaintiff must allege "both intentional discrimination against an identifiable political group and an actual discriminatory effect on that group").

Importantly, in *Hunt v. Cromartie*, 526 U.S. 541, 551 (1999) ("*Hunt I*"), this Court deemed "constitutional political gerrymandering" (i.e., that which is not invalid under *Bandemer*) to be a "traditional race-neutral principle." *See also Hunt v. Cromartie*, 532 U.S. 234 (2001) ("*Hunt II*") (concluding that "politics" and not race was the predominant reason for the challenged district being drawn as it was). In *Hunt I*, this Court concluded that summary judgment for those challenging the plan was improper because there was a material question of fact as to whether the legislature's predominant intent in drawing the challenged district was political or racial. In neither *Hunt I* nor *Hunt II* did this Court provide an exclusive list of what

constitutes permissible "political" intent. Among the political items being asserted by the defenders of the plan were "the intent to make [the challenged district] a strong Democratic district" and "protect[ing] incumbents." *Hunt I*, 526 U.S. at 549. In other words, it can be legitimate for politics to be a predominant reason for drawing districts, but it is never legitimate for race to be so.

Another difference between racial and partisan gerrymandering is the level of scrutiny applied. In racial gerrymandering claims, once it is shown that race was the predominant reason for drawing a district, a *prima facie* showing has been made and the burden shifts to the proponent of the plan to show a compelling state interest to justify the use of race, i.e., strict scrutiny applies. *Miller*, 515 U.S. at 920. Strict scrutiny is used because classification on the basis of race is suspect. *See Shaw*, 509 U.S. at 642 ("racial classifications are immediately suspect"). Partisan gerrymandering is different. Classification on the basis of major political party, party registration, or voter performance is not suspect and is not, in and of itself, unconstitutional. Political gerrymandering is not subject to strict scrutiny. *See Bush v. Vera*, 517 U.S. 952, 964 (1996) ("We have not subjected political gerrymandering to strict scrutiny."). In other words, only a rational basis need exist to support partisan gerrymandering. As this Court explained in *Shaw*:

> This Court has held political gerrymanders to be justiciable under the Equal Protection Clause. *But nothing in our case law compels the conclusion that racial and political gerrymanders are subject to precisely the same constitutional scrutiny.* In fact, our country's long and persistent history of racial discrimination in voting – as well as our Fourteenth Amendment jurisprudence, which always has reserved the strictest scrutiny for discrimination on the basis of race – would seem to compel the opposite conclusion.

509 U.S. at 650 (citations omitted; emphasis added).

The use of strict scrutiny every time partisan affiliation was used as a factor – even as the predominant reason – for drawing district lines, would create monumental problems. As the *Bandemer* plurality explained:

> [W]e [] reject the District Court's apparent holding that *any* interference with an opportunity to elect a representative of one's choice would be sufficient to allege or make out an equal protection violation, unless justified by some acceptable state interest that the State would be required to demonstrate. In addition to being contrary to the above-described conception of an unconstitutional political gerrymander, such a low threshold for legal action would invite attack on all or almost all reapportionment statutes. District-based elections hardly ever produce a perfect fit between votes and representation. The one person, one vote imperative often mandates departure from this result ... .

478 U.S. at 133 (emphasis in the original).

In addition to these notable differences between the analyses for racial and partisan gerrymandering, the theory that Appellants would pull from the *Shaw* line of cases for application here – i.e., that a state legislature cannot redistrict in a fashion that subordinates all "traditional redistricting criteria" to achieve a certain partisan ends – was rejected by the plurality in *Bandemer*. In responding to Justice Powell's suggested standard for identifying an unconstitutional partisan gerrymander, the plurality stated:

> [T]he crux of Justice Powell's analysis seems to be that – at least in some cases – the intentional drawing of district boundaries for partisan ends and for no other reason violates the Equal Protection

> Clause in and of itself. We disagree, however, with this conception of a constitutional violation. Specifically, even if a state legislature redistricts with the specific intention of disadvantaging one political party's election prospects, we do not believe that there has been an unconstitutional discrimination against members of that party unless the redistricting does in fact disadvantage it at the polls.

478 U.S. at 138-139. The *Shaw* line of cases offers no guidance on the interpretation and application of *Bandemer*. *See also O'Lear v. Miller*, 2002 U.S Dist. LEXIS 9533 (E.D. Mich. No. 01-72584, issued May 24, 2002) (reaching the same conclusion).

C. U.S. CONST. art. I, §4

Appellants urge the Court to announce in this case that U.S. CONST. art. I, §4 – independent of the Fourteenth Amendment – operates to forbid partisan gerrymandering.[7]

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[7] In their Jurisdictional Statement, Appellants state that the three-judge court granted the motion to dismiss their "political gerrymandering claims" and "examined those claims entirely within the framework set forth by the plurality opinion in [] *Bandemer*, never acknowledging (despite a motion for reconsideration) Appellants' separate Article I Arguments." J.S. at 6 (emphasis added). This recitation of events is misleading. As explained above, the February 22, 2002 opinion and order which dismissed Claim II (partisan gerrymandering under the Fourteenth Amendment) left pending Claim I (alleged violation of the one-person, one-vote principle). Plaintiffs filed a Motion for Clarification and/or Reconsideration, asking the court to clarify whether, by not dismissing Claim I, it had left pending the partisan gerrymandering claim based on U.S. CONST. art. I, §4 which was supposedly encompassed within Claim I. Presiding Officers responded, *inter alia*, that because Plaintiffs had argued in response to the motions to dismiss that U.S. CONST. art. I, §4 operated as an independent restriction of

Appellants argue that "Article I strictly constrains the political faction that happens to control the state legislature at the right moment in the 10-year congressional redistricting cycle from dictating the composition of Pennsylvania's congressional delegation ... ." J.S. at 29. Quoting from the dissent in *Anne Arundel County Republican Cent. Comm. v. State Admin. Bd. of Election Laws*, 781 F.Supp. 394, 402-03 (D. Md. 1991), *aff'd*, 504 U.S. 938 (1992), Appellants argue that "[u]nder Article I, 'the state may not attempt to dictate the outcome of congressional elections' by drawing congressional districts that confer a substantial advantage on one political party." J.S. at 29-30.

In support of this asserted U.S. CONST. art I, §4 prohibition, Appellants interpret decisions of this Court – decided in markedly different contexts – to stand for a general principle that "Article 1 forbids States from using their Section 4 authority to thwart the will of the majority of voters ... ." J.S. at 26. U.S. CONST. art. I, §4, however, has never been used as an independent basis for invalidating congressional redistricting legislation as a political gerrymander and the cases relied on by Appellants offer no substantial reason for it to be so used. *See U. S. Term Limits, Inc. v. Thornton*, 514 U.S. 779 (1995) (invalidating state constitutional amendment prohibiting the name of an otherwise eligible candidate for Congress from appearing on the general election ballot if that candidate has already served set number of terms); *Cook v. Gralike*, 531 U.S. 510 (2001) (invalidating state constitutional amendment providing that members of state's congressional delegation or candidates who failed to

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partisan gerrymandering and the court, in addressing Claim I, had focused solely on the standard for resolving one-person, one-vote claims, the court had implicitly rejected Plaintiffs' theory. The court denied the Plaintiffs' Motion for Clarification and/or Reconsideration on February 26, 2002.

support an attempt to amend the U.S. Constitution to include term limits would be noted as such on the ballot).

U.S. CONST. art. I, §4 is an express grant of authority to state legislatures and to Congress to regulate the time, place and manner of congressional elections. *See Smiley v. Holm*, 285 U.S. 355, 366 (1932) (the words of art. I, §4 "embrace authority to provide a complete code for congressional elections"); *Oregon v. Mitchell*, 400 U.S. 112, 119 (1970) ("In the very beginning the responsibility of the States for setting the qualifications of voters in congressional elections was made subject to the power of Congress to make or alter such regulations if it deemed advisable to do so").[8] While this Court has stated that U.S. CONST. art. I, §4 cannot be used to "immunize state congressional reapportionment laws which debase a citizen's right to vote from the power of courts to protect the constitutional rights of individuals from legislative destruction," *Wesberry v. Sanders*, 376 U.S. 1, 6 (1964), it has never recognized the provision as providing an independent, private cause of action for partisan gerrymandering in the context of redistricting by an affected individual. State legislatures or Congress, to whom the manner of holding elections is delegated, might have authority to impose such a restriction by statute, but, with respect to Appellants' attempted application of the restriction, U.S. CONST. art. I, §4 cannot be used to vindicate private interests.[9]

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[8] As Justice Black noted in *Oregon*, U.S. CONST. art. I, §4 "was a compromise between those delegates to the Constitutional Convention who wanted the States to have final authority over the elections of all state and federal officers and those who wanted Congress to make laws governing national elections." 400 U.S. at 119 n.2 (citing 2 J. Story, COMMENTARIES ON THE CONSTITUTION OF THE UNITED STATES, 280-292 (1st ed. 1833)).

[9] Appellants complain that the three-judge court ignored this claim. However, given the manner in which Appellants

At best, Appellants' argument that U.S. CONST. art. I, §4 provides protection against a plan that is designed to dictate electoral outcomes is essentially an argument in favor of proportionality. Such a requirement has been roundly rejected in the redistricting context. For example, as the plurality stressed in *Bandemer*, "a group's electoral power is not unconstitutionally diminished by the simple fact of an apportionment scheme that makes winning elections more difficult, and a failure of proportional representation alone does not constitute impermissible discrimination." 478 U.S. at 132. As Justice O'Conner pointed out, such a requirement is inconsistent with the concept of electing representatives by districts:

> Districting itself represents a middle ground between winner-take-all statewide elections and proportional representation for political parties. If there is a constitutional preference for proportionality, the legitimacy of districting itself is called into question: the voting strength of less evenly distributed groups will be invariably diminished by districting as compared to at-large

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buried the claim in their Amended Complaint, there was no reason for the court to address it. If Appellants had believed they had two separate causes of action arising under U.S. CONST. art. I, they should have pleaded two distinct "counts" (not "claims") in order to facilitate clear presentation of "the matters set forth." Fed. R. Civ. P. 10(b); *see also Nemitz v. Cunny*, 221 F. Supp. 571, 575 (N.D. Ill. 1963) ("different causes of action based on different legal theories, even though based on essentially identical facts, should be alleged in separate counts"). Because, in the Amended Complaint, "Claim I" consisted of a mere citation to the United States Constitution, it is not surprising that the three-judge court treated Claim I as alleging only a vote-dilution claim. Appellants' wholly inadequate presentation of the claim is a sufficient basis to find the question presented concerning U.S. CONST. art. I, §4 insubstantial and to support summary affirmance.

> proportional systems for electing representatives. Moreover, one implication of the districting system is that voters cast votes for candidates in their districts, not for a statewide slate of legislative candidates put forward by the parties. Consequently, efforts to determine party voting strength presuppose a norm that does not exist – statewide elections for representatives along party lines.

478 U.S. at 159 (O'Connor, J., concurring in the judgment only).[10]

Appellants offer no principled basis for constitutionalizing proportionality and thereby avoiding the difficult challenge of establishing the discriminatory effects prong of the *Bandemer* standard for unconstitutional partisan gerrymandering. The question they present regarding U.S. CONST. art. I, §4 is not substantial and offers no basis for this Court to do other than summarily affirm the three-judge court's decision to dismiss the partisan gerrymandering claim.

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[10] Appellants attempted precisely what Justice O'Connor cautioned against. The Amended Complaint pleaded facts about statewide races to support the partisan gerrymandering claim. Ironically, the facts pleaded undercut their argument. E.g., in 2000, Democrat candidates won only 2 out of 5 statewide races. *See supra* n.2.

CONCLUSION

For the foregoing reasons, the present appeal should be dismissed for lack of jurisdiction, or, in the alternative, the decision below, which dismissed the partisan gerrymandering claim for failure to state a claim, should be summarily affirmed.

Respectfully submitted,

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